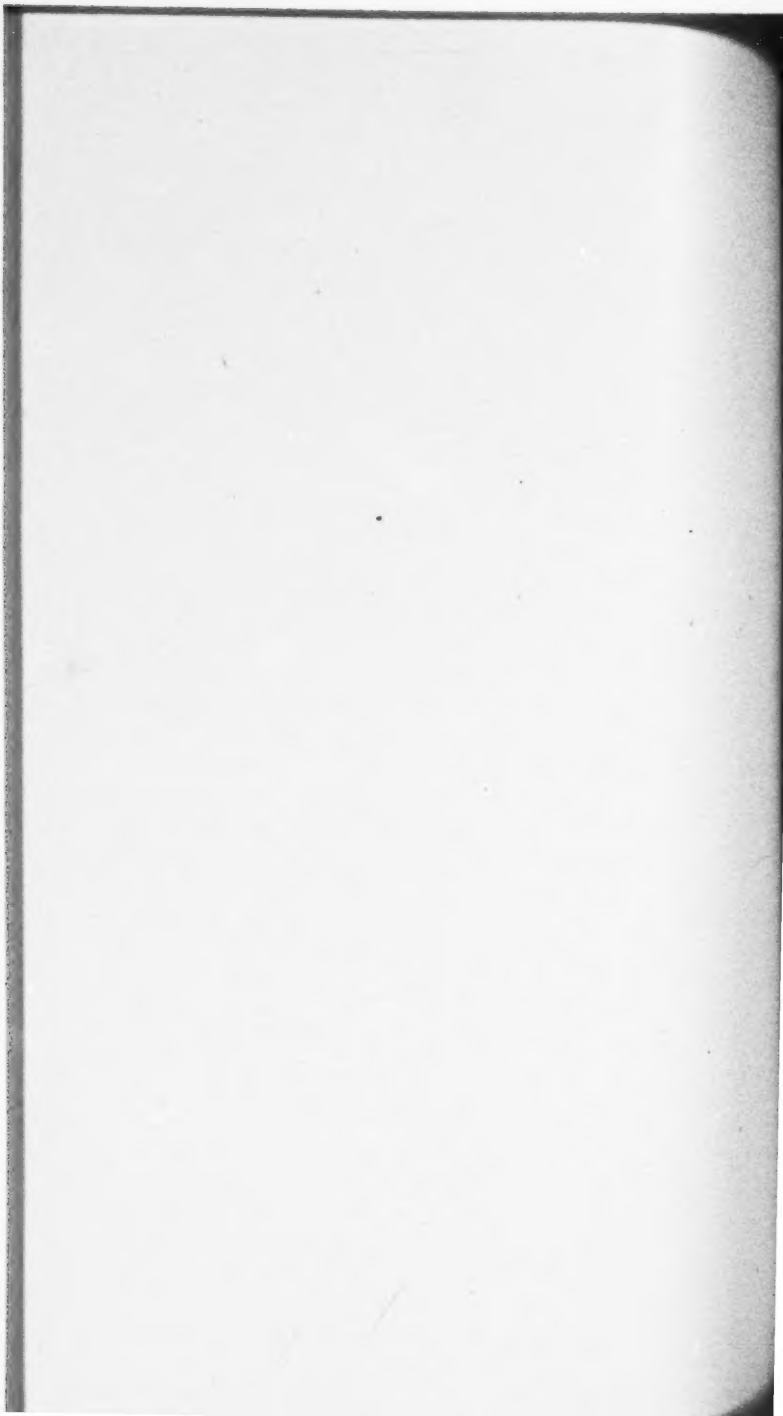

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No. 96 (and 198 of 1897)

Sy. of Atty. Gen. (Brief)

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In the Supreme Court of the United States.

OCTOBER TERM, 1899,

WILLIAM WHEELER HUBBELL, appellant; v. THE UNITED STATES; } No. 96.

AND

OCTOBER TERM, 1897,

WILLIAM WHEELER HUBBELL, v. SAME. } No. 198.

APPELLEE'S BRIEF ON APPELLANT'S MOTION TO RESTORE CASE NO. 198 OF OCTOBER TERM, 1897, TO THE DOCKET, AND FOR LEAVE TO ARGUE SAME IN CONNECTION WITH NO. 96 OF THE PRESENT TERM.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899,

WILLIAM WHEELER HUBBELL, appellant, v. THE UNITED STATES; } No. 96.

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OCTOBER TERM, 1897,

WILLIAM WHEELER HUBBELL, v. SAME. } No. 198.

APPELLEE'S BRIEF OF APPELLANT'S MOTION TO RESTORE CASE NO. 198 OF OCTOBER TERM, 1897, TO THE DOCKET, AND FOR LEAVE TO ARGUE SAME IN CONNECTION WITH NO. 96 OF THE PRESENT TERM.

This motion is, in fact, a motion for a reargument of the case of *Hubbell* v. *United States*, fully argued before this court on April 13 and 14, 1898, decided without dissent May 31, 1898 (affirming the judgment of the court below), and reported in 171 U. S., 203.

When, shortly after the decision of the case, a motion for a rehearing was filed, it was not thought necessary to

oppose the motion by a printed brief; but in view of the rather unusual circumstance that the appellant has not seen fit to await the pleasure of the court upon his prior motion, but has now renewed it on the very day on which another case between the same parties is on the calendar for argument, and has further requested that the reargument take place as a part of the argument of that other case, the following brief has been prepared.

In considering this motion it is necessary to bear in mind the following facts and dates:

1883, April 19. Petition filed in case No. 13793, Court of Claims, the appellant's first case.

1885, June 1. Judgment entered by the Court of Claims, after trial, dismissing petition in said first case.

August 21. Application for appeal from said judgment filed.

1888, June 11. Petition filed in case No. 16261, Court of Claims, the appellant's second case (involving *the same issues* as the first case, but relating to facts occurring after that case had been begun).

1895, December 23. Judgment entered by Court of Claims, after trial, dismissing petition in said second case.

1896, March 20. Application for appeal from said judgment (in second case) filed.

July 6. Appeal (in second case) allowed on appellant's motion.

1898, April 13, 14. Appeal (in second case) argued. (No. 198, October term, 1897.)

May 31. Judgment (in second case) affirmed, and appeal dismissed.

June 7. Appeal (in first case) allowed on appellant's motion. (This appeal is now No. 96, October term, 1899.)

In consequence of the appellant's extraordinary delay (from August 21, 1885, to June 7, 1897) to perfect his appeal from the judgment in his first case, it has come about that an appeal from a judgment rendered June 1, 1885, is only now reached on the calendar, although an appeal from a judgment (on a state of facts presenting the same issues) rendered December 23, 1895, was argued in April, 1898, and dismissed May 31, 1898.

The reasons assigned for the present motion appear to be as follows:

(1) That the fact that the court below allowed an argument on a motion to amend the findings in the first case (No. 13793) to be made, along with an argument on a motion for a new trial and amendment of findings in the second case (No. 16261), shows that that court did not consider its judgment in the first case as rendering the issues raised in the second case *res judicata*.

(2) That the decision of this court, rendered May 31, 1898, upon the appeal from the judgment in the second case, may perhaps have been induced by the court's being misled by the form in which the transcript of the record on appeal had been prepared.

(3) That the appeal from the judgment in the first case having been perfected on June 7, 1898, vacated that judgment, so that it can not now avail to make good a plea or argument of *res judicata*.

These reasons will be considered in their order.

(1.)

The effect of the argument, in the court below, on the motion to amend findings.

The judgment in the first case was rendered June 1, 1885, and on August 14, 1885, the appellant moved for a new trial, and also, in the alternative, for an amendment of findings. On December 14, 1885, the motion for a new trial was overruled, but the motion for amendment of findings was allowed to stand until the defendant should be heard in opposition to it. By the practice of the Court of Claims, a motion, unless overruled at chambers when first presented, remains on the calendar until the party who made it asks to have it heard and finally disposed of. The appellant filed amendments of his motion from time to time, but never brought it up for a hearing until 1896, over ten years after it had been made, and after a judgment had been rendered against him in his second case. Some time before this motion was heard, and before the trial in the second case, certain portions of the record in the first case, previously unprinted, were allowed to be printed. The motion to print was entitled in both cases, but the matter covered by the motion was all in the record in the first case, and was used in the second case by agreement.

When the appellant, after judgment had been rendered against him in the second case, finally brought his motion for an amendment of findings in the first case to a hearing, it was heard along with motions for a new trial, and (in the alternative) amendment of findings, in the second case, at which hearing evidence taken in the second case

was allowed to be read. The motion in the first case was overruled, as was also the motion for a new trial in the second case, but the alternative motion for an amendment of findings in that case was allowed, the additional findings being, in the opinion of the court, "in substance not different from those heretofore filed," and not affecting "the result heretofore reached herein." (Rec. in case 198, Oct. term, 1897, p. 21.)

The appellant's brief on the present motion (p. 5) says:

> The result of such action [was] to include within the record in that case [the case heard by this court in 1898, and as to which this motion is now made] all findings of fact which were applicable to both cases, thus in effect combining the two cases for the purposes of an appeal, and presenting in a single record each and every question which could have been raised in this court upon appeal in either case.
>
> The practical effect of the court's action in this regard was to treat case No. 16261 as an amendment of or addition to case No. 13793, and it is apparent from the action of the court taken on the motion last above set forth that the court did not consider its judgment in case No. 13793, which must have been specifically brought to its attention in course of considering the matters growing out of that motion, as operating to render the controversy in case No. 16261 *res judicata*.

It is submitted that these conclusions are wholly unwarranted by the facts. It is true that the record in the second case (before this court in 1898) presented every question which could have been raised in this court on appeal in the first case, but this fact did not render the doctrine of *res judicata* any the less applicable. On the

contrary, it was precisely because the doctrine of *res judicata* applied that it was necessary to present in the record of the second case every question which could have been raised in this court upon appeal in the first case. The defense of *res judicata* can only be maintained upon an issue identical with that previously adjudicated, and when the question comes before an appellate court "each and every question which could have been raised" in that court upon appeal from the earlier judgment must be presented by the record of the appeal from the later judgment, in order to enable the court to properly decide as to the identity of the issues in the two cases.

As a matter of fact, the court could have made this decision perfectly well on the appeal heard in April, 1898, without the additional findings of fact. The court below expressly stated that "these findings, being in substance not different from those heretofore filed, do not, in the opinion of the court, affect the result heretofore reached herein;" and this court's affirmance of the judgment necessarily involves an affirmance of the opinion of the court below on this particular point, for if the new findings had affected "the result heretofore reached herein," the judgment would have been reversed. The fact that the additional findings were superfluous can not, therefore, in any way weaken the legal foundation of the judgment rendered in the case in which they were made.

Moreover, while the record on the appeal heard in April, 1898, presented (and would have presented even if the additional findings had not been made) in a single record every issue which could have been raised in this

court upon appeal in either case, this was not at all the same as "in effect combining the two cases for the purposes of an appeal," as appellant's counsel contends. The issues raised in the first case were fully before this court, and necessarily so, in order to enable it to determine whether they were also raised in the second case, but the *judgment* in the first case was not before this court for review, as no appeal from it had yet been perfected.

In no sense, therefore, can the practical effect of the action of the court below in making additional findings in the second case (No. 16261) be regarded as treating that case "as an amendment of, or addition to, case No. 13793," nor as any indication whatever that the court below "did not consider its judgment in case No. 13793 * * * as operating to render the controversy in case No. 16261 *res judicata*." The appellant's contention, if sound, would prevent the doctrine of *res judicata* from ever being applied by an appellate court. By this contention, as soon as the record in the case involving *res judicata* is properly made up (i. e., so as properly to present the issue previously adjudicated and enable the appellate court to decide as to its identity with the issue in the new case), then the court below must be held as having (by so making up the record as to present the question of *res judicata*) annulled its own decision sustaining the defense of *res judicata;* and, more than this, it must be held to have treated the second case as an amendment of the first, so as to bring its judgment in the first case before the appellate court for

review, even when no appeal from that judgment has been taken. If the appellant's contention means anything, it means this, which is, it is submitted, a palpable absurdity.

Now what the court below did was this. It entered a judgment in the first case, and overruled a motion for a new trial. It consented that evidence taken in a second case between the same parties might be read on the hearing of a motion to amend findings in the first case, and also allowed a part of the record in the first case not previously printed (but just as much before the court at the trial of that case as if it had been printed) to be printed for use in the hearing of that motion, as well as the trial of the second case. It entered a judgment in the second case on the ground of *res judicata*, repeating, necessarily, the findings in the first case, in order to show the identity of issues. It overruled the motion for amendment of findings in the first case. It added new findings in the second case, not differing in substance from those previously made in both cases. By so doing, it is contended, it destroyed the finality of its own judgment in the first case. Can this contention be seriously made? Can a court destroy the finality of a judgment by permitting any amount of evidence to be printed in support of motions to amend findings, or by hearing any number of motions to amend findings, or by doing anything whatever in another case between the same parties, or, in short, by anything else than direct vacation of the judgment?

(2.)

The effect of the form of the transcript of record.

The second reason for the present motion is still more extraordinary than the first. It is that "the form in which the transcript of the record on appeal (in case 198, October term, 1897) was prepared" may have misled this court, and thereby induced its conclusion that the doctrine of *res judicata* applied. This reason scarcely comports with a becoming respect for the intelligence of the court. The printed transcript had not, it is true, all the usual neatness of arrangement of transcripts in this court; but this was because the appellant refused to have it all printed at one time in the ordinary way, and insisted on inserting matter printed for the court below, and Patent Office copies of patents, so as to save himself a few dollars. Had the record been really unintelligible on this account, the fault would have been his own for interfering with the established system in regard to printing; but it is submitted that, defective as the record may be in neatness of finish, no lawer of ordinary intelligence, to say nothing of the honorable judges of this court, could have been "misled" by it in any way whatever.

The error into which, appellant contends, the court may have fallen by being misled by the form of the transcript, is that of concluding "that the prior judgment in case No. 13793, which was being held in abeyance by the Court of Claims, pending the disposition of the appeal in the former case, did operate to bar a recovery in the latter suit," the suit then before this court on appeal. The words "the former case" are a trifle ambiguous, but

seem to refer to the appeal in the first case, an appeal applied for in 1885, but not perfected until 1898, after the hearing of the appeal to this court in the second case. The most remarkable statement, though, is that the judgment in the first case "was being held in abeyance by the Court of Claims." How can a court hold a judgment "in abeyance?" Possibly by opening it (as distinguished from vacating it), but this judgment was never opened, nor was its finality in any way disturbed by the Court of Claims. The appellant had applied for an appeal, and had delayed for more than twelve years to perfect that appeal, but this delay of his (which in any other court would have been laches) certainly could not keep the judgment "in abeyance." The court below had done nothing whatever to hold that judgment "in abeyance," and it remained final for all purposes, subject only to the possibility of its being reversed by this court whenever the appeal should be perfected.

(3.)

The effect of perfecting the appeal in case No. 13793.

The third reason advanced in support of the present motion is, it is submitted, without foundation in law. It is that the perfecting of the appeal in case No. 13793, on June 7, 1898, vacated the judgment entered in that case on June 1, 1885, so that even if the judgment in case No. 16261 was rightly based on *res judicata* on December 23, 1895, and the latter judgment rightly affirmed by this court on May 31, 1898, this latter judgment and its affirmance by this court must now be held as of no avail on account of the *subsequent* perfecting of an appeal from

the original judgment. While this is not stated in so many words, it is evidently what is meant by the words, "a vacated judgment can not avail to make good a plea or argument of *res judicata*," these words being used in support of a motion like the present one.

In the first place, a perfected appeal from a judgment does *not* lessen its finality or prevent its operating as *res judicata* until the judgment is reversed, except in States were the contrary is provided by statute. In some States, like Iowa, a statute provides expressly that an appeal shall not affect the finality of a judgment, while in some other States the statutes are to the contrary effect. Where there are no statutes on the subject, the general rule, it is submitted, is that in the case of appeals which merely bring up the record, and do not provide for a retrial of the case (as appeals from a justice's court) the taking of an appeal does not lessen the finality of a judgment as far as concerns its effect as *res judicata*. Many instances of the application of this rule, both with and without the aid of a statute, can be cited. (*Cloud* v. *Wiley*, 29 Ark., 80; *Bank* v. *Wheeler*, 28 Conn., 433; *Allen* v. *Mayor*, 9 Ga., 286; *Moore* v. *Williams*, 132 Ill., 589; *People* v. *Richert*, 159 id., 496; *Nill* v. *Comparet*, 16 Ind., 107; *Burton* v. *Reeds*, 20 id., 87; *Burton* v. *Burton*, 28 id., 342; *Randles* v. *Randles*, 67 id., 434; *Mull* v. *McKnight*, id., 527; *State* v. *Krug*, 94 id., 366; *Line* v. *State*, 131 id., 468; *Willard* v. *Ostrander*, 51 Kans., 481; *Faber* v. *Hovey*, 117 Mass., 108; *Creighton* v. *Keith*, 50 Nebr., 810; *Suydam* v. *Hoyt*, 25 N. J. L., 230; *Parkhurst* v. *Berdell*, 110 N. Y., 386; *Sage* v. *Harpending*, 49 Barb. (N. Y.), 166; *Stevens* v.

Stevens, 76 Supr. Ct. N. Y., 332; *Paine* v. *Schenectady Ins. Co.*, 11 R. I., 411; *Thompson* v. *Griffin*, 69 Tex., 139; *Westmoreland* v. *Richardson*, 2 Tex., Civ. App., 175; and see *Burgess* v. *Hill*, 21 Mo. App., 313.)

Moreover, even if the law were otherwise, and the perfecting of an appeal prevented a judgment from operating as *res judicata*, it could not do so retroactively, so as to impair a judgment based on the effect, as *res judicata*, of another judgment not appealed from at the time the second judgment was rendered. Even the reversal of a judgment has no such retroactive effect.

> If the judgment roll was competent evidence when received, its reception was not rendered erroneous by the *subsequent* reversal of the judgment. Notwithstanding its reversal, it continued to have the same effect to which it was entitled when received in evidence. (*Parkhurst* v. *Berdell*, 110 N. Y., 386.)

If the reversal of a judgment by an appellate court has no retroactive effect upon cases where the judgment has already operated as *res judicata*, *a fortiori* the mere perfecting of an appeal by a party to a suit can have no such effect.

It is therefore submitted that the appellant's motion should be denied, and that the motion for a rehearing, filed in June, 1898, in case No. 198 of October term, 1897, should also be denied.

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